

RESPONSE TO ASTWMO AND EPA COMMENTS ON USACE ENGINEER REGULATION (ER) 200-3-1--FUDS PROGRAM POLICY

Introduction. U.S. Army Corps of Engineers (USACE) received 227 comments from the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and 97 comments from the US Environmental Protection Agency (EPA) on 20 July 2002 on the draft Engineering Regulation (ER) 200-3-1, “Formerly Used Defense Sites (FUDS) Program Policy”. Comments not incorporated are specifically noted in the following discussion sections. USACE original intent in responding to commenters was to provide a comment-by-comment, line-by-line change and identification thereof to the commenter. However, due to the large number of comments received and the extensive nature of revisions made to the document since the time of its review by ASTSWMO and EPA, it was not feasible to do so. Instead, comments have been grouped into 17 major categories as outlined in the table below. Responses have been prepared on a category-by-category basis and are included below in specific category paragraphs.

Comment Category	Number of EPA Comments	Number of ASTSWMO Comments
ARARs/State Regulations	1	14
CERCLA/NCP Adherence	19	44
Editorial/Formatting	5	31
FUDS Property and Project Eligibility	5	9
EPA Policy	4	0
Guidance Reference	4	5
Land Use Controls	4	4
Management Action Plans, Annual Workplans and DSMOA Funding Issues	10	9
“No DoD Action Indicated” and Closeout	8	5
Natural Resource Injury	0	4
FUDS Property Access	0	9
Public Involvement	4	36
Regulatory Involvement	13	37
Record of Decision/Decision Document Signature	2	2
Risk Associated Issues	5	4
Statutory Authorities	12	3
Other Issues	1	11
Total Number of Comments	97	227

ARARs and State Regulations. USACE received 15 comments pertaining to identifying and attaining Applicable or Relevant and Appropriate Requirements (ARARs), including State regulations and statutes. The commenters were primarily concerned with how State ARARs would be identified (one commenter felt it was USACE responsibility to identify State ARARs) and how they would be evaluated. Some commenters were concerned about the use of language that USACE would “consider” ARARs during the removal process.

USACE Response: Language used in the document regarding the identification, evaluation and attainment of ARARs has been significantly revised and now matches the ARAR language in the National Contingency Plan (NCP). USACE will attain or waive all appropriate ARARs for remedial actions and shall attain ARARs for removal actions to extent practicable considering the exigency of the situation and the scope of the removal action. All removal actions must transition back to the remedial process, at which point ARARs will be either be attained or waived prior to achieving closeout. Every effort will be made to coordinate with the States regarding identification of State ARARs. However, according to the NCP, the State is responsible for identifying State ARARs in a timely manner [40 CFR 300.400(g)(4)]. Only State standards that are promulgated, identified by the State in a timely manner, and more stringent than Federal requirements may be ARARs. One commenter wanted the ARAR identification process to be added to the removal process flowchart. Including this level of detail in the flowchart made it difficult to follow and USACE feels the discussion in the text regarding ARAR identification was adequate.

Adherence to CERCLA and the NCP. USACE received 63 comments from reviewers concerned that the FUDS Program responses were not conducted according to the NCP and CERCLA. Of the 51 comments, all but 20 were generated from Chapter 4. The 63 comments were divided into the following subcategories for ease and clarity of response:

1. 16 comments on PA/SI issues: The primary concern of commenters was that USACE was not following the CERCLA process at the PA/SI phase. Many commenters indicated that the Preliminary Assessment of Eligibility (PAE) did not provide adequate information to be considered equal to a CERCLA PA. Other comments received pertained to performing both removal and remedial PA/SIs. Some comments indicated concern that OE projects and their associated Archives Search Reports (ASRs) did not really fit the NCP process for PA/SIs.

USACE Response: Major changes have been made to the FUDS Program regarding adherence to CERCLA and the NCP. The “PAE” is no longer conducted; instead a CERCLA PA will be conducted. Requirements for and language related to the PA can be found in Chapters 3, 4 and Appendix B of the final ER. Language was also added to the document to explain the difference between removal and remedial site evaluations (according to the NCP), and when USACE will perform a removal site evaluation. The NCP does not require a removal site evaluation be performed prior to initiating a removal action if information in the remedial site evaluation is adequate to evaluate and justify the need to perform a removal action. For each newly identified eligible FUDS property and for re-visited properties, USACE will perform a CERCLA PA according to EPA PA guidance. In addition, a PA will be performed for an eligible FUDS property whenever a new Hazardous, Toxic, and Radioactive Wastes (HTRW) or Ordnance and Explosives (OE) project is identified for that property. For OE projects, the Archives Search Report (ASR) will be conducted as part of the PA phase when the property Risk Assessment Code (RAC) Score indicates the potential for OE at the site and an OE project is identified. OE confirmatory sampling will be performed as part of the SI phase if the PA indicates it is necessary.

2. 17 comments on removal action responses. Commenters focused on two main areas of concern. One, the USACE preference shown for conducting removal actions at OE projects

and two, that those OE removal actions were not conducted in accordance with CERCLA and the NCP. In addition, there were several comments made pertaining to technical corrections required for the document and a few commenters wanted more public and regulator involvement requirements added to Chapter 4.

USACE Response: Major revisions have been made to Chapter 4 and the rest of the document requiring CERCLA and the NCP be followed for HTRW and OE related response actions. All language that may have suggested a preference for OE response actions to be conducted as removal actions has been deleted/changed. In addition, no HTRW or OE response action will be able to be completed as a removal action. If a removal action is conducted, the response action will transition from the removal response to a remedial response for closeout. Technical corrections to text and figures have been made. In an effort to limit the overall size of the documents, USACE did not include specific regulator and public coordination requirements in Chapter 4. However, references to Chapters 9 and 8 were added to the text in Chapter 4 to ensure the reader was directed to those requirements.

3. 2 comments on EPA approval of workplans. Two comments were made regarding the requirement for EPA approval of Field Sampling Plans (FSP) and Quality Assurance Project Plans (QAPP).

USACE Response: The text was changed to state that the FSP and QAPP for NPL properties are required to be approved by EPA.

4. 4 comments on the Feasibility Study (FS) process. The commenters were concerned about statements made in the document regarding the distribution of the FS and how low-cost alternatives and those not requiring treatment were addressed during the evaluation of alternatives.

USACE Response: The language pertaining to the distribution of the FS has been clarified to be consistent with CERCLA and the NCP. Chapter 9 requires early coordination with regulators and Chapter 8 requires the FS to be included in the Administrative Record file for the project. Alternative evaluation language in the document was revised to be consistent with EPA guidance and the NCP.

5. 5 comments on Record of Decision (ROD) and Decision Document (DD) content. The primary areas of concern for this subcategory were the contents of the DD being less than that of a ROD and that the ROD/DD process for OE response actions was not clear.

USACE Response: The requirements for the DD found in Chapter 4 and Appendix C have been changed such that all information required for a ROD in the EPA guidance shall also be included in the DD (with the exception of EPA oversight roles at the site when EPA is not the lead regulator). In addition, one of the sweeping changes to the ER is that OE response actions will be conducted according to CERCLA, and therefore the OE ROD/DD process will also follow NCP requirements.

6. 2 comments on the Remedial Design (RD) phase. Two comments were made pertaining to the requirement to prepare a fact sheet for the public during the RD phase.

USACE Response: The text has been revised to require a fact sheet be prepared during the RD phase. The requirement was added to Chapter 8.

7. 3 comments on Long Term Monitoring (LTM) and 5-year review requirements. The three comments were primarily concerned with the content of the LTM discussion being limited to 5-year reviews. In addition, one commenter requested the text contain the CERCLA language at CERCLA 121(c).

USACE Response: An expanded discussion of the LTM phase was added that addressed other procedures such as operation and maintenance, monitoring, land use controls, and engineering controls.

8. 2 comments on following the CERCLA process in general. Both comments indicated overall concern with FUDS response actions not being conducted in accordance with CERCLA and the NCP.

USACE Response: As stated in the introductory section, sweeping revisions have been made to the ER that require all HTRW and OE response actions be conducted in accordance with CERCLA and the NCP.

9. 12 comments on public participation issues. The majority of the 12 comments pointed out where the ER was not consistent with the NCP. A few comments requested that USACE begin public involvement prior to NCP requirements.

USACE Response: Significant revisions were made to the document to ensure that the FUDS response process is conducted in accordance with CERCLA and the NCP. NCP requirements for public participation have been incorporated into the ER.

Editorial and Formatting Comments. Thirty-six comments were received that were formatting or editorial in nature. The comments were made throughout the document. Most comments requested that sections of the text be moved to different chapters or that typographical/grammatical errors be corrected. Other comments requested that additional detailed instructions be added to the ER. Several comments requested that definitions for Proposed Plans, RODs, CERCLA, Remedial Design and RI/FS be added to the glossary. One commenter stated that lack of cross-references to other chapters would result in the user missing or overlooking pertinent information and requirements.

USACE Response: To the maximum extent possible, the formatting and editorial comments were incorporated. In many cases, comments were overcome by deletions and significant revisions to the text. Not all the requested additional instructions/information was added to the ER, as the information is available in other USACE guidance documents that are referenced in the ER. The requested definitions were added to the glossary. In addition, extensive cross-reference to other chapters containing pertinent information was added throughout the document.

FUDS Property and Project Eligibility. Fourteen comments were received regarding FUDS property and project eligibility issues. The majority of comments pertained to FUDS eligibility definitions and criteria or requested that the criteria/definitions be clarified. In particular, one commenter felt that the eligibility criteria were policy and not statutory in nature and that they inappropriately restricted DoD's ability to respond in situations where they may be liable. One commenter disagreed that cemeteries should qualify for categorical exclusion status based upon the situation at the Tanapag Village Cemetery in Saipan. Some commenters were concerned that releases from underground storage tanks (USTs) might have occurred as part of DoD activities, yet would be ineligible if the tanks were beneficially used after the release. Other commenters wanted the terms "beneficially used" and "benefit private interests" to be clarified. One commenter wanted a justification for the eligibility criteria of "100 yards seaward of the mean high-tide point" for ordinance related contamination.

USACE Response: FUDS eligibility criteria are contained in the DoD Management Guidance for the Defense Environmental Restoration Program (DERP) and repeated in the FUDS ER. Clarification has been added to the text to help the reader understand some of the criteria/definitions. No change was made to the categorical exclusion status for cemetery properties as the nature of operations and activities at cemeteries are not associated with releases of hazardous substances. The contamination at the Tanapag cemetery resulted from typhoon winds and flooding transporting contaminated soils and PCBs to the site as well as residents transporting contaminated soil to the cemetery. Tanapag is considered a rare exception and should similar future situations be encountered, eligibility will be addressed on a case-by-case situation. If documentation or other evidence clearly indicates that releases from USTs occurred as part of DoD activities, response actions for the DoD portion of the release would be eligible under the FUDS Program. The definition of "beneficial use" has been added to the glossary. The limiting criteria of 100 yards seaward of mean high-tide point is based upon identical criteria in the DoD Management Guidance for DERP, paragraph 9.5.2.9.

EPA Policy Issues. Four comments were received pertaining to EPA policy issues. One commenter stated that the ER implied FUDS properties are placed on the Docket by EPA. Another commenter wanted clarification made to the ER regarding natural attenuation to show it was "monitored natural attenuation" and to limit its use to sites with groundwater remedial alternative. In addition, the commenter requested the EPA guidance be cited. Two other commenters did not make any requested changes to the ER but rather just made statements regarding EPA's option to pursue other enforcement options at FUDS.

USACE Response: As the commenter suggested, indicating that FUDS are automatically placed on the Docket is not correct. Most FUDS properties are currently not owned by the Federal government and not considered as "Federal facilities" by definition. Accordingly, most FUDS properties should not be placed upon the docket. Language in the ER suggesting that all FUDS properties are placed on the docket has been deleted. In regard to the comment about natural attenuation, the FUDS ER references the NCP in evaluating appropriate remedial alternatives for a site. The two comments pertaining to EPA using other enforcement options were noted.

Guidance Reference Issues: Nine comments were received pertaining to the use of guidance references within the ER. All comments were made on Chapter 4. Four of the comments wanted the ER to provide references to EPA guidance. Five comments indicated that references to existing USACE guidance should not be made, but rather the actual guidance language be included in the ER.

USACE Response: FUDS program is required to follow DoD, Army, and USACE guidance. DoD, Army, and USACE guidance is consistent with DERP, CERCLA, and the NCP. The FUDS ER includes references to other guidance, as appropriate. Comments requesting that detailed language found in other official USACE guidance be included in the ER were not incorporated. In the interest of maintaining a reasonable size for the ER, USACE will continue to refer the reader to other USACE guidance as necessary. The referenced USACE guidance is available to the public at <http://www.usace.army.mil/inet/usace-docs>

Land Use Controls (LUCs): Eight comments were received regarding LUCs. Five of the commenters wanted the ER to include more information on the “how to” aspects of LUCs such as evaluation, selection and implementation. One commenter wanted the ER to clarify that LUCs are considered remedial actions under CERCLA, and that physical controls are considered engineering controls and not institutional controls. Another commenter wanted the discussion of LUCs to be included in Chapter 4 rather than in Chapter 10. And finally, one commenter wanted the ER to emphasize consideration of cleaning up to background levels and attain a level of “no significant risk”.

USACE Response: Because FUDS properties are located in all States and DoD does not currently own the property, each LUC implemented will be of a unique nature. Attempting to include detailed “how to” instructions that would cover all situations would be out of scope for the ER and therefore, no additional instructional language was added. However, language was added to the ER that states LUCs are remedial actions under CERCLA and a clarification was made that LUCs include engineering controls in addition to institutional controls as discussed in the NCP. The discussion of LUCs was moved to Chapter 4 as requested. USACE did not directly incorporate the comment requesting USACE consider cleaning up to background prior to considering implementation of LUCs. The ER was revised such that the remedial response process at FUDS will adhere to CERCLA and the NCP. Therefore, when considering remedial alternatives, USACE will evaluate the nine NCP criteria and any remedial alternative selected will meet the two threshold criteria for being protective of human health and the environment and for attaining ARARs in addition to a balanced assessment of the remaining seven criteria.

Statewide Management Action Plans (SMAPs) and Annual Workplan (AWP) Issues: A total of 19 comments were received pertaining to SMAP and AWP related issues. They addressed a wide range of topics from involving regulators in the planning and budgeting process to Defense State Memorandum of Agreement (DSMOA) funding issues and regulator access to the FUDS Management Information System (FUDSMIS). All comments have been incorporated into the ER unless discussed in the USACE response section below. Comments were divided into the following subcategories for ease and clarity of response:

1. Several comments requested that regulators be involved in the planning, budgeting and AWP development processes and that they be allowed access to FUDSMIS.

USACE Response: Given the time constraints in the normal budget document and AWP preparation process, it is not possible or practical to closely involve regulators in the budgetary process. However, USACE will involve regulators in the development of the SMAP, which addresses cost-to-complete, project prioritization and scheduling. A regulatory version of FUDSMIS called the Executive Management System has been developed and is available to regulators on the Internet through the Defense Environmental Network and Information Exchange (DENIX) website at <http://www.denix.osd.mil>. Users must request and obtain the “userid” and “password” from the DENIX homepage.

2. Two comments indicated that regulators should have a concurring role in SMAP development.

USACE Response: The SMAP is intended to be a jointly developed planning document; therefore regulators have a participatory role versus an approval role.

3. Two comments requested that more details pertaining to SMAP contents be added to the ER.

USACE Response: Specific requirements for the SMAP content and format were not included in the ER as individual State’s have differing visions of what their State’s MAP should look like and what information they wish to have in it. Therefore, the ER only provides a set of goals for the SMAP. The content and format will be determined based upon coordination between the USACE District FUDS Program Manager and regulators.

4. One comment indicated that USACE does not determine regulatory roles at FUDS and that EPA and the State will decide this issue.

USACE Response: The intent of the ER was to identify key goals of the SMAP and to state that the SMAP should identify the lead regulator for the various properties within a State. The SMAP development process is an excellent vehicle to use to establish these roles as regulators and USACE will be discussing and coordinating various project activities within a State.

5. One comment requested that MAPs be used as the basis for the DSMOA two-year execution plan for FUDS within a state and requested the DSMOA discussion in the ER on Step 6 include a statement that the MAP process and DSMOA 6-step process should complement one another.

USACE Response: This comment was overcome by revisions to the ER in which the detailed discussion of the DSMOA six-step process was deleted.

6. One comment requested that USACE cite guidance for the MAP and Project Management Plan (PMP) to clarify the distinction between the two. The comment was generated from the roles and responsibilities section of Chapter 2 of the ER.

USACE Response: No revision was made to the ER in response to this comment. The PMP as discussed in the ER is a project-specific management document required by USACE regulation ER 5-1-11, while the MAP is a requirement of the DoD Management Guidance for DERP and reflects a property level management document.

No DoD Action Indicated (NDAI) and Closeout Issues: Thirteen comments were received pertaining to NDAI/Closeout procedures. All but 4 of the 13 comments primarily addressed the issue of regulator concurrence on NDAI decisions. One comment was made regarding the use of the term, “USACE decision authority.” Another comment questioned the ER’s discussion of “NDAI criteria in Federal and State regulations.” There was one comment recommending USACE include a discussion of closeout milestone documents to help EPA to concur with closeout decisions. And finally, one commenter requested that an additional attachment describing the State’s position on the closeout be added to the Potentially Responsible Party (PRP) closeout letter.

USACE Response: In the final ER, the discussion of the NDAI process and Closeout process was expanded in order to help the reader distinguish the difference between the two. NDAI determinations are USACE programmatic decisions intended solely to assist USACE in demonstrating attainment of DERP program goals and objectives to Army and DoD. An NDAI determination can be made at the property or project level and is made by USACE when the project delivery team determines no further DoD response action is required to address FUDS eligible contamination. Language in the ER requires project managers to provide the lead regulator with notice and opportunity to comment on NDAI determinations. However, concurrence on NDAI determinations is not required. On the other hand, regulatory concurrence IS required on all project closeout determinations with two exceptions: (1) BD/DR projects based entirely on safety rather than environmental issues; and (2) PRP projects where USACE negotiates a fair and equitable settlement representing DoD’s contribution for contamination at the property and response actions are performed by other PRPs. In order to emphasize the difference between NDAI determinations and Closeout determinations, the discussions of the two have been separated in the ER. NDAI determinations are discussed in Chapter 6 as part of USACE internal practices and procedures while closeout determinations are now discussed in Chapter 4 as part of the response process.

The comments regarding USACE decision authority and NDAI criteria in Federal and State regulations were overcome by the extensive revisions to the document. The language in question was deleted from the ER. An expanded discussion of closeout reports was added to the Property and Project Closeout section in Chapter 4. Chapter 5 was revised to include a requirement that a copy of comments from the lead regulator on PRP closeouts be included in PRP project closeout documentation.

Natural Resource Injury (NRI): Four comments were received addressing NRI issues. One commenter indicated there may be instances where enhancing or restoring natural resources may not cost any more than just restoration and provided an example of using native grasses to cover a landfill rather than regular grass seed. The commenter did not want the ER to completely ban consideration of natural resource enhancement and/or restoration, but rather felt it should be

considered and subject to approval prior to the decision. One commenter thought Natural Resource Damage (NRD) and restoration could be done concurrently to avoid lengthy and costly NRD assessments. And finally, two comments were received pertaining to NRI issues discussed in Appendix D.

USACE Response: USACE cannot use ER-FUDS funds to either assess natural resource damages or to enhance or restore natural resources beyond CERCLA remediation requirements. However, in the case of the type of vegetative cover used at a landfill site (or similar “simple” situations), natural resource personnel or other regulators may certainly make the recommendation to use native grasses as part of the opportunity for comment process. If the use of such does not cause additional cost and provides benefit, it could certainly be considered under the NCP evaluation process for remedial alternatives. As stated previously, NRD assessments cannot be performed with ER-FUDS funds. However, Trustees will be provided with all project data and information, and can determine whether or not they wish to assess NRD. Establishing a waiver process for combining NRD assessments and restoration activities is beyond the scope of this ER and beyond the authority of USACE.

The two comments pertaining to language in Appendix D have been overcome by document revisions. The old Appendix D and its discussion of legislative context and authorities have been deleted from the ER.

FUDS Property Access Issues: Nine comments were received regarding FUDS property access. All comments were made on Appendix H. Nine of the comments pertained to the language and format of the standard real estate forms provided in the appendix. One commenter stated that should the owner refuse right-of-entry, USACE should take action anyway to respond to the release.

USACE Response: The real estate forms provided in Appendix H (Appendix G in the final ER) are draft forms only and can be changed on a site-specific basis upon approval from Headquarters USACE real estate personnel. No changes were made to the draft real estate forms provided in the ER. FUDS policy for property owners who refuse entry is not to compel entry. The language in Appendix H applies to the action USACE will take in such situations, and that is to notify the owner that without cooperation, no action can take place on the site and that the appropriate regulatory agency would be notified. However, Chapter 3 states that properties determined to be ineligible (including when the owner refuses right of entry) shall be formally referred to the appropriate DoD component, Federal agency, or State agency in writing. At that point, USACE and the lead regulator would most likely meet and establish an approach to addressing the situation.

Public Involvement Comments: A total of 40 comments were received pertaining to public comment issues. Of those comments, one was directed at public participation requirements for Resource Conservation and Recovery Act (RCRA) corrective action, 2 addressed the Technical Assistance for Public Participation (TAPP) program and 37 were requests for the ER to contain additional details regarding specific public involvement activities.

USACE Response: The comment on public involvement for RCRA corrective action was overcome by revisions to the document that deleted the section addressing RCRA corrective action. “TAPP” was defined as requested and a brief discussion included in the ER along with a reference to Engineer Pamphlet (EP) 1110-3-8, “Public Participation in the Defense Environmental Restoration Program (DERP) for Formerly Used Defense Sites (FUDS).” The referenced EP contains detailed information and requirements for the TAPP program as it applies to FUDS as well as other public involvement requirements. In the interest of keeping the overall size of the ER reasonable, requests to include very specific details were not incorporated into the ER. Instead, references to EP 1110-3-8 were added to the text as appropriate.

Regulator Involvement Comments: A total of 50 comments were received addressing regulator involvement issues. Comments were generated from throughout the ER. Twenty-eight comments pertained to coordination with regulators during FUDS response actions, 7 requested early regulator involvement in the Inventory Project Report (INPR) process, 5 requested regulators be involved and kept updated on budgetary and Annual Work Plan (AWP) type information throughout the year, 4 wanted to see either regulator concurrence or statements of unresolved regulator issues included in decision documents, 3 were related to the DSMOA dispute resolution process and oversight of PRP projects, 2 were related to the definition of the “lead regulator” and 1 requested that the State be consulted for approval of off-site waste disposal facilities.

USACE Response: The ER was revised to require early and meaningful coordination with regulators. The ER requires notice and opportunity for comment to EPA, and appropriate State and local authorities in accordance with the DERP statute. In addition, early coordination is required during the development of all new and updated INPRs to allow EPA, the States and affected tribes to ensure all available environmental information is taken into account before eligibility determinations are finalized.

USACE will involve the lead regulator in the development of the SMAP that addresses cost to complete, project prioritization, scheduling and the AWP. USACE has developed a regulatory executive management system that provides regulators with access to MAPs, obligations and expenditures, cost-to-complete information and RAB information.

Chapter 4 of the ER was revised to state that EPA concurrence is required on all NPL Records of Decision (RODs). While concurrence of the State and/or EPA is not required for non-NPL decisions documents (DDs), USACE shall actively seek concurrence and efforts shall be made to identify and resolve outstanding regulator issues and comments provided by the State on NPL RODs and the EPA and/or State on non-NPL DDs. Figure C-1, “FUDS Decision Document Staffing Procedures,” in Appendix C of the ER shows in the DD staffing procedure a requirement to address comments made by the lead regulator.

Language providing for DSMOA funding of State oversight of PRP projects at which USACE is performing remedial action work was added. In addition, language addressing the dispute resolution process pertaining to non-PRP projects was deleted from the ER and the reference to the CA period being from July 1 – June 30 was dropped. No specific dates for the CA period are

provided in the ER. Instead the reader is referred to the Cooperative Agreement process guidance.

The lead regulator definition in the ER was changed to be consistent with the Issue Paper developed by the former FUDS Improvement Working Group (FIWG) (now known as the FUDS Forum).

The language in the ER regarding off-site disposal of CERCLA wastes is consistent with the NCP. EPA maintains an updated list of regional off-site contacts that can easily be accessed by USACE team members.

Record of Decision (ROD) and Decision Document (DD) Signature Issues: Four comments were received on Chapter 4 pertaining to ROD and DD signature issues. Three of the comments related to EPA approval of RODs and the general ROD approval process and one comment was made indicating States should sign and concur with non-NPL property DDs.

USACE Response: The discussion of the ROD signature process has been significantly revised in the ER to address EPA/ASTSWMO comments and new DoD policy. For NPL projects, USACE must obtain EPA concurrence on the ROD for the selected remedy. For NPL projects, written concurrence and approval of the ROD by the State is not required. For non-NPL projects, written concurrence and approval of the DD by the EPA and/or the State is not required. However, in all cases, concurrence shall be actively sought and efforts made to identify and resolve outstanding regulator issues and comments provided by the State on NPL RODs and the EPA and/or State on non-NPL DDs.

Risk Associated Issues: A total of 9 comments were received pertaining to Relative Risk Site Evaluation (RRSE) and general risk related issues. Four comments were made regarding the use of the terms “no significant risk” and “no significant threat” in the ER and that the goal of the FUDS program should be to eliminate unacceptable risk rather than simply to reduce risk. Two comments requested the information in the referenced DoD Relative Risk Site Evaluation (RRSE) Primer and Risk Assessment Code (RAC) be included in the ER. One comment questioned why Petroleum, Oils and Lubricants (POL) releases with hazardous substances are not included in the RRSE process, one was related to the RRSE process at PRP projects and one requested a revision to Figure 4-1 in the text be changed to add a decision point for having reduced risk to acceptable levels and having attained ARARs prior to going to project closeout from a removal action.

USACE Response: The goals of the FUDS Program as stated in the ER are consistent with those established in the DoD Management Guidance for the DERP. In addition, use of the term “no significant threat” is consistent with language used in the NCP for determining if a response action is required following a remedial Site Inspection (SI) [See 40 CFR 300.420(c)]. Other use of the term in the ER is found only in the Property/Project closeout discussion and closeout cannot be attained without regulator approval.

The discussion of RRSE, RAC scores and DoD RRSE Primer was expanded in Chapters 1 and 6 and the DoD RRSE Primer added to the glossary. In order to keep the overall size of the ER at a

reasonable level, specific instructions contained in the Primer were not included in the ER. However, the Primer is available at http://www.dtic.mil/enviroDoD/Policies/Cleanup/re/risk_about.htm.

POL releases not associated with a tank (i.e., not a CON/HTRW project) will be scored using the RRSE for benzene, toluene, ethyl benzene, and xylene (BTEX) and any other hazardous substances in the release such as PCBs. RRSE is not performed for CON/HTRW projects as it is assumed no sampling will be performed until the tank is removed and therefore data is not available for use in prioritizing CON/HTRW projects using RRSE. RRSE is not performed at PRP projects in accordance with the DoD RRSE Primer. The figures in the final ER have been significantly revised and the previous Figure 4-1 no longer exists. However, USACE shall transition back to the remedial process once removal actions are completed. Project closeout can no longer be achieved from a removal action.

Statutory Authority Issues: A total of 15 comments were received pertaining to statutory authorities and other legal issues associated with response actions at FUDS. Because the comments covered a wide range of issues, the comments were divided into the following subcategories for ease and clarity of response:

1. Several commenters had questions about the use of the term “under the jurisdiction of DoD” and requested clarification of its use.

USACE Response: The phrase “under the jurisdiction of the Secretary” provided for in 10 USC §2701(c) encompasses actions by the Secretary to carry out all response actions with respect to releases of hazardous substances from each of the following: (A) Each facility or site owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary. (B) Each facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances. (C) Each vessel owned or operated by the Department of Defense. DERP program authorities specifically provide that the Secretary will act consistent with CERCLA in carrying out program response actions to hazardous substances. It is the DoD and Army position that, pursuant to E.O. 12580, DoD is the “lead agency” when undertaking CERCLA response actions authorized by the Defense Environmental Restoration Program, 10 U.S.C. 2701, to address DoD contamination at Formerly Used Defense Sites (FUDS) properties.

2. One commenter requested clarification of the term “discretionary authority” in the ER.

USACE Response: The term “discretionary” has been removed from the text. The Secretary’s authority is contained in the DERP legislation, 10 U.S.C. 2701-2708 as well as within CERCLA pursuant to Presidential delegation affected by E.O.s 12580 and 13016.

3. Two commenters requested clarification of DoD’s policy to “cash out” PRP settlements.

USACE Response: The term “cash out” has been removed from the text of the ER. Chapter 5, Section 5-2 elaborates on the USACE PRP mission goals. USACE focuses its PRP efforts

toward settlement of any DoD CERCLA liability with other PRPs, rather than on conducting response actions at properties where other PRPs are involved. The goal at such properties is to negotiate a fair and equitable settlement with other PRPs who either have or will take the response action in exchange for a release of DoD liability under CERCLA, other applicable environmental laws, and rules of common law. Such settlements are certified by DOJ for payment from the Judgment Fund, as they reflect liability incurred by the United States associated with past DoD activities. Section 5-2.2.2 provides the reasons behind this PRP mission goal.

4. Two commenters questioned why regulatory authorities may be more difficult to determine for non-NPL FUDS relative to NPL FUDS.

USACE Response: The sentence in question was deleted. Guidance agreed to and issued by the FIWG (currently known as the FUDS Forum) to identify the lead regulator for NPL and Non-NPL sites as between EPA, State and Tribal regulators is specifically referenced in the ER and should serve to clarify the responsible lead regulator for FUDS properties.

5. One commenter requested the legal citation to clarify the requirement that DoD/USACE resolve CERCLA PRP liability issues at FUDS.

USACE Response: The Secretary of Defense bears responsibility for addressing all liabilities arising from actions of the Department in coordination with the DOJ. Dealing with CERCLA liabilities associated with FUDS properties are encompassed in this responsibility and considered to be within the Secretary's environmental restoration functions. The Secretary has delegated executive agent responsibility for FUDS to the Army. The Army's FUDS Charter provides that USACE will on behalf of DoD, execute all environmental restoration-related administrative and litigation actions, PRP liability agreements, and settlement arrangements associated with past DoD activities at eligible FUDS properties.

6. One commenter requested the legal citation of the "fiscal law principles" preventing FUDS funding from being used to cleanup non-DoD contamination.

USACE Response: The applicable citation is found in 31 U.S.C. 1301(a). Additionally, 10 U.S.C. 2703(b) limits use of ER-FUDS appropriations for obligation and expenditure to carry out the environmental restoration functions of the Secretary. Recognizing DoD clean-up efforts might involve situations where DoD contamination is commingled with that of other parties, Congress authorized DoD in 10 U.S.C. 2703(d)(1) to credit amounts recovered by DoD from these other parties for their share of the clean-up costs to the ER account used by DoD for clean-up. The litigation risk and difficulties inherent in pursuing such cost recoveries, as well as the expense involved, prompted DoD to focus the use of its limited program funds toward response actions at sites where other PRP's commingled waste is not involved.

7. One commenter felt the policy to pursue GOCO operators as liable under CERCLA at FUDS is inconsistent with 10 USC 2701(c)(1) and 2701(c)(1)(B).

USACE Response: USACE's approach as noted at section 5-4.6 of the ER is to pursue liable GOCO's whenever it proves financially viable. This is considered consistent with Congress's intent that polluter's pay their fair share and that ER funds are used only to address environmental restoration functions of the Secretary at FUDS properties. USACE does not view this approach as being inconsistent with the cited provisions of Title 10.

8. One commenter felt that Appendix D (which was deleted from the final ER) did not adequately address ordnance as a CERCLA hazardous substance.

USACE Response: DoD views ordnance as a pollutant or contaminant and not as a CERCLA hazardous substance. DoD's policy is to apply the CERCLA and NCP process to OE responses. As noted in section 4-3.1 of the final ER, all USACE response activities addressing Military Munitions Response Program (MMRP) (ordnance) and hazardous substances, pollutants or contaminants shall be conducted in accordance with the provisions of CERCLA, E.O.s 12580 and 13016, and the NCP.

9. One commenter objected to the discussion of Sovereign Immunity in the ER.

USACE Response: The term "sovereign immunity" has been deleted from the final ER text. The final ER text at section 4-4 provides that Office of Counsel be consulted in all instances where a lead regulator makes demands that are inconsistent with the USACE response plan and on all issues related to the extent of Federal or State authority for site specific analysis, including ARARS.

10. One commenter felt the PRP process flowchart does not allow contingency to handle immediate/potential threat to human health and the environment prior to case settlements with PRPs. In addition, the commenter requested USACE district offices to provide each State in their district the PRP projects summary.

USACE Response: Lead regulators will be provided notice of PRP projects and provided a copy of the applicable INPR. This will be supplemented on an annual basis by input on PRP status provided by USACE to ASTSWMO per agreement reached by the FIWG. See Figure 5-1 in the final ER. Additionally, USACE PRP Districts are available to discuss regulatory interests and concerns, on case-by-case bases, which arise from their evaluation of sites involving USACE PRP projects. Lead regulators are free to take any action consistent with their authorities to remedy situations that they view as potentially harmful to the public or the environment.

Other Issues: Twelve comments were received that did not fall into one of the previously discussed categories. Of the 12, 4 pertained to the cost-to-complete (CTC) issues, 3 were statements not requesting any changes be made to the ER, and 5 were related to specific issues. The CTC and specific issue comments are addressed individually below.

1. One comment requested that a reference to Statement of Federal Financial Accounting Standard (SFFAS) No. 6 be added to the ER. SFFAS No. 6 was added to Appendix A of the ER in References section.

2. Two CTC comments requested new entries be added to Tables E-1 and E-3 of Appendix E of the ER. These tables were deleted in the final ER.
3. One CTC comment recommended that USACE use a percentage of the CTC used for reporting environmental liability for annual financial reports. USACE believes the commenter did not understand that annual financial reports of environmental liability cover the total liability for the program and not just liability for a particular year. No change was made to the ER.
4. One comment indicated the ER should contain language stating that if CERCLA hazardous substances were encountered during a BD/DR, then CERCLA would be applicable. The ER was revised to state that should incidental hazardous substances be encountered during work at a BD/DR project, the response action for the hazardous substance shall be conducted in accordance with CERCLA and the NCP as part of the BD/DR project. However, if the hazardous substances found are not incidental but rather significant in nature, a new project under the appropriate program category will be established.
5. One comment requested clarification of who will make the determination that “reasonable evidence” exists in real estate documentation to warrant formal determination of eligibility and INPR preparation. The ER was revised to indicate the USACE District Commander makes this determination.
6. One comment asked how response actions at projects would be conducted under RCRA. The ER contains language that for Underground Storage Tanks (USTs) RCRA Subtitle I (or applicable State UST regulations) will be followed. Discussion of RCRA corrective action for other responses was deleted from the ER, as corrective action is not conducted at FUDS. DoD does not own the property and does not hold RCRA Part A or Part B permits that would trigger RCRA corrective action.
7. One commenter thought the FUDS program should utilize accurate location data for properties. The ER was revised to include latitude and longitude data in the INPR checklist.